Supang Lutu (f) v Felicia Damus (f)

HIGH COURT (MIRI) — SUIT NO MYY-22–31/9 OF 2012
STEPHEN CHUNG JC
14 JUNE 2013

Civil Procedure — Striking out — Pleadings — Slander — Plaintiff filed writ and statement of claim and served on defendant — 14 days limited for appearance lapsed — Filing of certificate of non-appearance by plaintiff — Whether slanderous words pleaded — Whether claim null and void

Tort — Defamation — Libel and slander — Whether actual words pleaded in to — Whether action should fail — Whether words pleaded understood in proper context it was used — Burden to prove exact words uttered and meaning of those words

There were six applications filed by the parties in this action and heard together by the court. The plaintiff had filed writ and statement of claim on 27 September 2012 and served them on the defendant on 5 October 2012. The 14 days limited for appearance for the defendant to file her appearance lapsed on 18 October 2012. The plaintiff filed a certificate of non-appearance on 19 October 2012 and submitted that the defendant filed an appearance without any notice to the plaintiff nor procuring leave from this court. The plaintiff pleaded that the defendant's sister, had asked the plaintiff to send her to the Jabatan Pendaftaran Negara, Miri ('JPN') to be a witness to the marriage of her brother. Upon their arrival at JPN, the defendant's sister informed the plaintiff that she could not be a witness to her brother's marriage because she did not have any proper document and sought the plaintiff's help to be a witness to the marriage to which the plaintiff agreed. They agreed to go home to change clothes. The plaintiff pleaded that at about 2.30pm after the official witnessing of the marriage, the defendant arrived, without any notice nor warning, angrily pointed and shouted at the plaintiff outside the JPN office, in a public area, and slandered and accused the plaintiff in these words 'Iko nah suh ngarusak keluarga kamih' in *Kelabit*, a language which was understood by the defendant and plaintiff and by those present who could understand the true meaning of the said words. It was pleaded that the defendant knew that the slanderous statement and or allegation made against the plaintiff was false, not a true statement and a negligent misstatement aimed at humiliating, intended

to bring the plaintiff to public ridicule and was said recklessly without caring for the truth of the said statement. A

Held, dismissing encls 7, 11, 12 and 14; allowing encls 17 and 28:

(1) It is trite that there was not any statutory provision or rules of court that the actual words must be pleaded in to, failing which the action would fail. Where the libel turned on the meaning of a particular word or words, the words must be pleaded so that the words used could be understood in the proper context it was used (see para 12). B

(2) The words complained of were uttered or spoken and not in written form. The words uttered were in *Kelabit*. These words were pleaded and reproduced in full in the original language in the statement of claim. The defendant submitted that the plaintiff did not plead or reproduce a translation of the words complained of nor produce or enclose a certified translation of the words complained of in the language of the court and therefore the plaintiff's claim was defective, null and void (see para 14). C D

(3) The court must look at the purpose and what prejudice it caused to a defendant in putting up his defence, in short the justice of the case. In this case, the alleged defamatory words were set out in the statement of claim. The defendant had denied that she had uttered the alleged defamatory words and denied the natural and ordinary meaning of the words alleged. The alleged defamatory words were disputed. The burden was on the plaintiff to prove the exact words uttered and the meaning of those words. The plaintiff should have called witnesses who heard and understood what were uttered and the meaning of those words in the trial. The witnesses who heard and understood those words would be able to translate or explain the meaning of those words. Therefore the failure to plead and produce a certified translation of the words complained of was not fatal to the plaintiff's claims (see paras 14–15). E F G

(4) The plaintiff's claims against the defendant should be heard and determined on the merits of the case. The court should be slow to strike out or dismiss the plaintiff's case unless the claim was obviously unsustainable on the face of it. There was no merit to strike out the plaintiff's case. Similarly, the defence which was filed and served out of time should not be struck out merely on a technicality. The defendant had applied for leave and extension of time in respect of the defence filed. The defence also should be heard on the merits (see paras 16–17). H

[Bahasa Malaysia summary I

Terdapat enam permohonan yang dibuat oleh pihak-pihak dalam tindakan ini dan didengar bersama-sama oleh mahkamah. Plaintif telah memfailkan writ dan pernyataan tuntutan pada 27 September 2012 dan menyerahkannya kepada defendan pada 5 Oktober 2012. 14 hari terhad untuk penampilan bagi

A defendan untuk memfailkan penampilannya luput pada 18 Oktober 2012. Plaintif telah memfailkan sijil ketidakhadiran pada 19 Oktober 2012 dan berhujah bahawa defendan memfailkan kehadiran tanpa apa-apa notis kepada plaintif mahupun mendapatkan kebenaran daripada mahkamah. Plaintif mengaku bahawa adik defendan, telah meminta plaintif untuk menghantarnya
B ke Jabatan Pendaftaran Negara, Miri ('JPN') untuk menjadi saksi kepada perkahwinan abangnya. Setibanya mereka di JPN, adik defendan memaklumkan plaintif bahawa dia tidak boleh menjadi saksi kepada perkahwinan abangnya kerana dia tidak mempunyai apa-apa dokumen yang betul dan meminta bantuan plaintif untuk menjadi saksi kepada perkahwinan
C itu yang mana dipersetujui oleh plaintif. Mereka bersetuju untuk pulang ke rumah untuk menukar pakaian. Plaintif berhujah bahawa pada 2.30 petang selepas secara rasmi menyaksikan perkahwinan itu, defendan tiba, tanpa apa-apa notis mahupun amaran, menuding jari ke arah plaintif dengan marah
D dan menjerit kepada plaintif di luar pejabat JPN, di kawasan awam, dan memfitnah dan menuduh plaintif dengan kata-kata 'Iko nah Suh ngarusak Keluarga kamih' dalam bahasa Kelabit, bahasa yang difahami oleh defendan dan plaintif dan oleh mereka yang hadir yang dapat memahami makna sebenar perkataan itu. Adalah diplidkan bahawa defendan tahu bahawa pernyataan
E fitnah dan atau tuduhan terhadap plaintif adalah palsu, bukan kenyataan yang benar dan salah nyata cuai bertujuan memalukan, bermaksud untuk menyebabkan plaintif dipersendakan oleh orang awam dan dikatakan secara melulu tanpa menghiraukan kebenaran kenyataan tersebut.

F **Diputuskan**, menolak lampiran 7, 11, 12 dan 14; membenarkan lampiran 17 dan 28:

(1) Adalah tidak dipertikaikan bahawa tidak ada mana-mana peruntukan berkanun atau kaedah-kaedah mahkamah bahawa kata-kata sebenar mesti dikemukakan, sekiranya gagal, tindakan itu akan gagal. Di mana
G fitnah itu bertukar kepada maksud perkataan atau kata-kata tertentu, perkataan tersebut mesti dikemukakan supaya perkataan yang digunakan boleh difahami dalam konteks yang betul ia telah digunakan (lihat perenggan 12).

H (2) Perkataan-perkataan yang diadu telah dilafazkan atau diucapkan dan bukan dalam bentuk bertulis. Perkataan yang diucapkan adalah dalam bahasa Kelabit. Perkataan-perkataan tersebut dikemukakan dan diterbitkan semula sepenuhnya dalam bahasa asal di dalam pernyataan tuntutan. Defendan berhujah bahawa plaintif tidak mengaku atau
I mengemukakan semula terjemahan perkataan yang diadu atau mengemukakan atau menyertakan terjemahan yang disahkan bagi perkataan diadukan dalam bahasa mahkamah dan oleh itu tuntutan plaintif adalah cacat, tidak sah dan terbatal (lihat perenggan 14).

(3) Mahkamah perlu melihat maksud dan apa prasangka yang menyebabkan

defendan memasukkan pembelaannya, secara ringkas keadilan kes itu. Dalam kes ini, perkataan fitnah itu telah dinyatakan dalam pernyataan tuntutan. Defendan telah menafikan bahawa dia telah mengucapkan perkataan fitnah itu dan menafikan erti semula jadi dan biasa perkataan yang didakwa. Perkataan fitnah yang didakwa telah dipertikaikan. Beban adalah ke atas plaintif untuk membuktikan perkataan-perkataan yang tepat diucapkan dan makna perkataan-perkataan itu. Plaintif sepatutnya memanggil saksi-saksi yang mendengar dan memahami apa yang telah diucapkan dan makna kata-kata dalam perbicaraan. Saksi-saksi yang mendengar dan memahami perkataan-perkataan tersebut akan dapat menterjemah atau menerangkan maksud perkataan. Oleh itu kegagalan untuk memplid dan mengemukakan terjemahan yang disahkan perkataan diadu tidak fatal kepada tuntutan plaintif (lihat perenggan 14–15).

(4) Tuntutan plaintif terhadap defendan perlu didengar dan diputuskan atas merit kes. Mahkamah harus perlahan untuk membatalkan atau menolak atas faktanya kes plaintif melainkan jika tuntutan itu adalah jelas tidak mapan di mukanya. Tidak ada merit untuk membatalkan kes plaintif. Begitu juga, pembelaan yang difailkan dan diserahkan di luar masa tidak boleh dibatalkan semata-mata atas alasan teknikal. Defendan telah memohon kebenaran dan lanjutan masa berkenaan dengan pembelaan yang difailkan. Pembelaan juga harus didengar atas meritnya (lihat perenggan 16–17).]

Notes

For cases on libel and slander, see 12 *Mallal's Digest* (4th Ed, 2013 Reissue) paras 724–732.

For cases on pleadings, see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 8062–8077.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Hassan & Anor v Wan Ishak & Ors [1961] 1 MLJ 45, CA (refd)

Karpal Singh a/l Ram Singh v DP Vijandran [2001] 4 MLJ 161, CA (refd)

Lim Kit Siang v Datuk Dr Ling Liong Sik & Ors [1997] 5 MLJ 523, HC (refd)

Worker's Party v Tay Boon Too & Anor [1975] 2 MLJ 124, CA (refd)

Pauline Sagau (Sagau, Raja & Co) for the plaintiff.
Merlyn Toh (Yi & Co) for the defendant.

A

Stephen Chung JC:

[1] There are six applications filed by the parties in this action and heard B together. They are as follows:

(a) In encl 7, the plaintiff applied for an order that the memorandum of appearance dated 6 December 2012 be struck out and dismissed and that judgment be entered against the defendant;

C (b) In encls 11 and 12, the defendant applied for an order that the writ and statement of claim be struck out on the grounds that there was no certified English translation of the words uttered in *Kelabit* by the defendant in the statement of claim and that particulars of facts and or special facts and circumstances giving rise to the action were not pleaded D in the statement of claim;

(c) In encl 14, the plaintiff applied that encl 11 and the defence served on the plaintiff is bad and ought to be struck out;

(d) In encl 17, the defendant applied that leave be granted to the defendant E to file and serve the appearance and defence out of time; that the time for the defendant to file and serve the appearance and defence be abridged or extended and that the certificate of non-appearance filed on 19 October 2012 be set aside; and

F (e) In encl 28, the defendant applied that leave be granted to the defendant to amend the intitulement in encl 17 in the manner shown and underlined in red in the proposed amended notice of application and that there was an inadvertent mistake in the intitulement in encl 17.

G **[2]** The facts showed that the writ and statement of claim were filed on 27 September 2012 and served on the defendant on 5 October 2012. The 14 days limited for appearance for the defendant to file her appearance has lapsed on 18 October 2012. The plaintiff filed a certificate of non-appearance on 19 October 2012. The plaintiff submitted that the defendant filed an H appearance without any notice to the plaintiff nor procuring leave from this court.

[3] The plaintiff submitted that the defendant has filed the application to strike out the plaintiff's claim without leave of the court and without any I proper appearance filed. The plaintiff submitted that the appearance was filed outside the time and without leave from the court. It was submitted that the defence was filed without the leave of the court.

[4] The defendant affirmed that on 27 October 2012, between 5.00pm to

6.00pm at her family house in Bario, her brother Jarison Damus passed her an envelope and told her that it was delivered to the house by the plaintiff's nephew. She said that she opened the envelope but did not understand the documents because she is illiterate in English. She said that on 21 November 2012 the wife of their *Ketua Kampung* looked for her and told her that the plaintiff has sued her and she was required to go to Miri on 22 November 2012 to present herself in court and if she failed to attend court the plaintiff would seize the family house and land at the kampong and the plaintiff would ask the police to arrest me.

[5] The defendant affirmed that she was frightened by the news and possible consequences. She said that the Ketua Kampung's wife helped her to secure a seat on the plane and arrived Miri at about 4pm. She said that when she entered the court room Ms Pauline Sagau called her name and asked her to go out to talk.

[6] The defendant affirmed that Pauline Sagau tried to persuade her to admit the plaintiff's claim and asked for time to pay. She was told that if she admitted to the plaintiff's claim the case would be concluded on the same day and there was no need for her to go to court anymore. The defendant said that Pauline told her that if she intended to dispute the plaintiff's claim she would ended up having to pay more to the plaintiff between RM10,000 to RM40,000.

[7] The defendant affirmed that when her case was called, she informed the court that she required time to look for a lawyer. After the mention she requested Pauline Sagau to arrange for her to meet the plaintiff to discuss the matter. Pauline told her that she could not talk or meet the plaintiff without her consent and that this matter could not be amicably settled unless she paid the plaintiff the sum of RM10,000. She said Pauline instructed her to write a formal letter to the plaintiff to propose a settlement sum.

[8] The defendant said that she was in Miri from 3 December 2012 to 6 December 2012 to look for a lawyer to represent her. She said that Mr Sam Laya told her that he could not handle the matter on her behalf and referred her to Messrs Yi & Co Advocates who agreed to handle this matter on her behalf. On 6 December 2012 and 20 December 2012 her Advocates filed and served the appearance and defence respectively.

[9] The plaintiff pleaded that Norhayati Damus, the defendant's sister, had asked the plaintiff to send her to the Jabatan Pendaftaran Negara ('JPN') Miri where she was to become a witness to the marriage of her brother Daniel Damus with Alice Musa. It was pleaded that upon their arrival at JPN office Miri, Norhayati informed the plaintiff that she could not be a witness to her brother's marriage because she did not have any proper document and sought

the plaintiff's help to be a witness to the marriage to which the plaintiff agreed. They agreed to go home to change clothes so that they would be presentable before the officers of the JPN at about 2pm on the same day.

[10] The plaintiff pleaded that at about 2.30pm, after the official witnessing of the marriage, the defendant arrived, without any notice nor warning, angrily pointed and shouted at the plaintiff outside the JPN office, in a public area, and slandered and accused the plaintiff in these words 'Iko nah suh ngarusak keluarga kamih' in *Kelabit*, a language which was understood by the defendant and plaintiff and by those present who could understand the true meaning of the said words.

[11] It was pleaded that the defendant knew that the slanderous statement and or allegation made against the plaintiff was false, not a true statement and a negligent misstatement aimed at humiliating, intended to bring the plaintiff to public ridicule and was said recklessly without caring for the truth of the said statement.

[12] It is trite that there isn't any statutory provision or rules of court that the actual words must be pleaded in to to failing which the action fails. Where the libel turns on the meaning of a particular word or words, the words must be pleaded so that the words used can be understood in the proper context it was used: *Karpal Singh a/l Ram Singh v DP Vijandran* [2001] 4 MLJ 161. It has been held that the exact words as uttered must be reproduced in the original language with a certified translation in the language of the court, in the absence of which the claim will fail: *Lim Kit Siang v Datuk Dr Ling Liong Sik & Ors* [1997] 5 MLJ 523, *Worker's Party v Tay Boon Too & Anor* [1975] 2 MLJ 124.

[13] In this case, the words complained of were uttered or spoken and not in written form. The words uttered were as follows 'Iko nah suk ngarusak keluarga kamih' in *Kelabit*. These words were pleaded and reproduced in full in the original language in para 6 of the statement of claim. The defendant submitted that the plaintiff did not plead or reproduce a translation of the words complained of nor produce or enclose a certified translation of the words complained of in the language of the court and therefore the plaintiff's claim is defective, null and void.

[14] In *Hassan & Anor v Wan Ishak & Ors* [1961] 1 MLJ 45, the alleged defamatory words were spoken in Malay. Those words and the translation thereof in the language of the court were not set out in the statement of claim and it was held that it was not fatal. The court must look at the purpose and what prejudice it causes to a defendant in putting up his defence, in short the justice of the case: *Karpal Singh v DP Vijandran*.

[15] In this case, the alleged defamatory words have been set out in the statement of claim. The defendant has denied that she had uttered the alleged defamatory words and denied the natural and ordinary meaning of the words alleged. The alleged defamatory words were disputed. The burden is on the plaintiff to prove the exact words uttered and the meaning of those words. The plaintiff should call witnesses who heard and understood what were uttered and the meaning of those words in the trial. The witnesses who heard and understood those words would be able to translate or explain the meaning of those words. Therefore the failure to plead and produce a certified translation of the words complained of is not fatal to the plaintiff's claims.

[16] The plaintiff's claims against the defendant should be heard and determined on the merits of the case. The court should be slow to strike out or dismiss the plaintiff's case unless the claim is obviously unsustainable on the face of it: *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36. For the reasons given, there is no merit to strike out the plaintiff's case.

[17] Similarly, the defence which was filed and served out of time should not be struck out merely on a technicality. The defendant has applied for leave and extension of time in respect of the defence filed. The defence also should be heard on the merits.

[18] Enclosures 7, 11, 12, 14 are dismissed. Enclosures 17 and 28 are allowed. Each party to pay their own costs.

Enclosures 7, 11, 12 and 14 dismissed; encls 17 and 28 allowed.

Reported by Afiq Mohamad Noor